

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 12, 2008 Session

**AMPHARM, INC. v. EASTLAND PHARMACY SERVICES, LLC ET AL. v.
AMERICAN HEALTH CENTERS, INC.**

**Appeal from the Circuit Court for Williamson County
No. 01646 Russ Heldman, Judge**

No. M2006-01334-COA-R3-CV - Filed November 5, 2008

Company A sued company B for breach of contract and unjust enrichment. Company B filed a third-party complaint against company A's parent company for wrongful withdrawal from partnership. Company A and its parent company sought to hold the sole owner of company B personally liable. The trial court granted a motion for summary judgment in favor of company A and its parent company on all issues, including the personal liability of company B's owner. We affirm as to the liability of company B, but reverse as to the imposition of personal liability on the company owner.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Reversed in Part**

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Robert L. DeLaney, Nashville, Tennessee, for the appellant, Eastland Pharmacy Services, LLC et al.

C.J. Gideon, Jr. and Kelly R. Thomas, Nashville, Tennessee, for the appellees, AmPharm, Inc. and American Health Centers, Inc.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Eastland Pharmacy Services, LLC ("EPS") is a limited liability corporation originally created in 1998 by William Samples and two other investors. After March 1, 2000, Mr. Samples was the sole member of EPS. In early 2001, Mr. Samples and Norman Noffsinger, a pharmacist employed by EPS, were seeking a financial partner to help EPS implement a concept they called "CIPA,"

Clinical Independent Pharmacists of America. The CIPA concept involved providing comprehensive pharmaceutical services to mostly elderly patients who needed multiple, long-term medications.

Mr. Samples and Mr. Noffsinger met with Don Ross, an employee of American Health Centers, Inc. ("AHC"), a Tennessee corporation, on February 14, 2001, to discuss the CIPA concept and their business plan. Mr. Samples and Mr. Ross signed a non-disclosure/non-compete agreement on behalf of EPS and AHC respectively. The same parties met again on February 21, 2001. EPS presented a written proposal for a possible joint venture between EPS and AHC. Under the terms of the proposal, EPS would have 60% ownership and AHC would have 40% ownership in the new partnership entity. AHC would supply \$600,000 in capital, and EPS would transfer its assets and liabilities to the new entity. On March 2, 2001, Mr. Samples, Mr. Noffsinger, and Dr. Scott Trochtenberg, EPS's medical director, met with the AHC board of directors. The ownership terms were changed to a 50-50 split between EPS and AHC. On March 13, 2001, Mr. Ross informed Mr. Samples and his colleagues that AHC required the business plan to be rewritten to eliminate the participation of Health Essentials, a company with which EPS had been negotiating to be part of the implementation scheme.¹

Although the parties have different views regarding the circumstances surrounding the arrangement, the parties agree that AmPharm, Inc., a Tennessee corporation and a wholly owned subsidiary of AHC, agreed to allow EPS to purchase pharmaceuticals on AmPharm's account with wholesaler Bergen Brunswig. According to EPS, AHC wanted EPS to increase its inventory to implement the joint venture. On March 29, 2001, EPS made its first purchase of pharmaceuticals using the AmPharm account. Mr. Brownyard, AmPharm's director of pharmacy, helped EPS with the ordering of pharmaceuticals and, according to EPS, helped Mr. Noffsinger begin to implement the business plan.

Mr. Samples and Mr. Noffsinger continued to meet with AHC representatives. At an April 4, 2001 meeting with Mr. Ross, the parties set a target date of May 1, 2001, for the execution of the organizational documents. On April 18, 2001, Mr. Samples met with Ann Vise, AHC's financial director, who was conducting a due diligence investigation of EPS's financial records. At a meeting on April 24, 2001, the parties set another target date of May 15, 2001, for the execution of the operating agreement and the formal transfer of assets. The parties discussed the need to hire employees for the joint venture. On April 25, 2001, articles of organization for the new entity, PharmAssist Healthcare, LLC were recorded with the Tennessee Secretary of State. Soon after, a bank account and employer identification number were acquired for PharmAssist. On April 30, 2001, Ms. Vise requested additional financial information regarding EPS from Mr. Samples. By May 31, 2001, Ms. Vise had created a proposed balance sheet for PharmAssist.

EPS continued to order pharmaceuticals through AmPharm's account. The May 31, 2001 balance sheet of EPS shows an amount of \$113,293.52 for "accounts payable trade." According to

¹This change in the business plan resulted from a meeting in Virginia with AHC's counsel. Mr. Noffsinger attended this meeting.

AmPharm/AHC, this is the exact amount of purchases made by EPS on the AmPharm account to that date.

On June 1, 2001, a meeting was held at the Mercury Airport in Nashville. In attendance were Jim Smith, CEO of AHC, Mr. Ross, Mr. Noffsinger, Mr. Samples, and attorneys for both parties. There was discussion concerning the terms of the joint venture operating agreement. Mr. Samples stated that AHC would need to supply a \$600,000 capital contribution without any reduction for the existing inventory of pharmaceuticals acquired through AmPharm or for the joint venture's assumption of EPS debt as described in the business plan. As reflected in Mr. Samples's memorandum from the meeting, a number of terms remained unresolved, including the responsibility for EPS debt, terms of employment contracts, and capital call requirements. In early June 2001, AHC provided a revised draft of an operating agreement and bylaws for PharmAssist. No operating agreement was ever signed for the PharmAssist joint venture.

On June 20, 2001, Mr. Smith and Mr. Ross met with Mr. Samples and Mr. Noffsinger and informed them that AHC had decided to take another route and proposed to purchase EPS instead. On June 22, 2001, AHC sent EPS a letter of intent reflecting its interest in purchasing EPS. The letter was expressly made "subject to the negotiation and execution of formal and definitive agreement(s) among the parties." The letter of intent contained a number of contingencies, including a due diligence investigation with results satisfactory to AHC and the execution of "a definitive purchase agreement evidencing the foregoing transaction." Another provision stated that, except with respect to the confidentiality, exclusivity, and brokerage provisions, "no party is bound hereby, nor shall any claim be made based upon any good faith obligation to undertake negotiation." The letter of intent was to expire on June 29, 2001. On June 28, 2001, EPS made its final purchase of pharmaceuticals on the AmPharm account. The same day, AHC sent EPS another letter stating that "[u]nless the parties can come to terms on this acquisition by the close of business on Friday, June 29, 2001, AHC expects and hereby demands Eastland's immediate delivery to AmPharm, Inc. of \$120,443.07 in cash or combination of cash and inventory to cover the credit previously extended to Eastland." EPS submitted a counterproposal to AHC regarding the sale; AHC rejected the counterproposal. AHC revised the letter of intent to terminate on June 30, 2001.

An EPS balance sheet dated June 30, 2001, shows a line item of \$120,443.07 denoted "Unsecured Investment Am. Health" as a long term liability. A second June 30, 2001 balance sheet shows a line item for the same amount denoted "Contingent Liability Am. Health" as a long term liability.

On July 2, 2001, AHC sent EPS a letter stating that, since the parties had not come to terms on the acquisition, an AHC representative would arrive at EPS that day to collect a check or inventory or combination thereof in the amount of \$120,443.07. EPS refused to allow AHC access to its offices. In a letter dated July 2, 2001, EPS's attorney stated that, "regardless of how Eastland and AHC have arrived at the present situation, Eastland is prepared to make arrangements to pay the amount owed to AmPharm, Inc. upon mutually agreeable terms."

The parties subsequently renewed negotiations, and on July 20, 2001, AHC sent EPS another letter of intent regarding the acquisition. This letter of intent contained the same contingencies and limitations previously described with respect to the original letter of intent. EPS made a counteroffer on August 3, 2001. AHC made a final offer on August 15, 2001 and sent EPS another letter of intent with the same contingencies and limitations on August 21, 2001. Mr. Samples never signed either letter of intent. Mr. Samples testified by deposition that by early September 2001, the negotiations with AHC were over and he was negotiating with another company, Max Well Medical.² On September 11, 2001, AHC sent EPS a letter confirming that the deadline in the final letter of intent had expired and demanding payment of \$120,443.07.

On October 11, 2001, Mr. Samples sent Mr. Smith a letter in which he stated that EPS was “very interested in working with you and American Health Centers in some capacity to settle the outstanding liability that was incurred during our venture negotiations.”

In July 2002, Mr. Samples signed a confidentiality agreement with Windsor Pharmacy Services, LLC. In February 2003, EPS and Windsor signed a letter of understanding. On March 1, 2003, Windsor and EPS entered into a consulting agreement whereby Windsor would pay Mr. Samples a consulting fee to develop the market for a product called Med-Assistance. Mr. Samples admitted that Med-Assistance is essentially the same as CIPA. Windsor and EPS also entered into an option agreement giving Windsor the option to purchase EPS’s assets. In December 2003, Windsor and EPS entered into a settlement agreement under which Windsor paid Mr. Samples lump sums of \$17,000 and \$29,094 and payments of \$8,500 a month for twelve months; EPS would surrender all collateral, including the CIPA concept rights.

Before the Windsor negotiations began, in October 2001 AmPharm filed a complaint on a sworn account against EPS alleging two claims: a breach of contract claim based on an oral agreement whereby AmPharm extended credit to EPS for the purchase of pharmaceuticals, and a claim of unjust enrichment. The complaint was supported by an affidavit of Mr. Brownyard, AmPharm’s pharmacy services director. In August 2002 EPS filed a third-party action against AHC alleging that EPS and AHC had formed an oral partnership and that AHC had wrongfully withdrawn from the partnership. EPS sought damages and an order requiring the winding up of the partnership’s affairs. In April 2004, AmPharm and AHC filed an amended complaint adding a claim for the individual liability of Mr. Samples.

In February 2006, Mr. Samples filed a motion for partial summary judgment on the individual liability claim. At the same time, AmPharm and AHC filed a joint motion for summary judgment in their favor on all claims. The motions were heard on May 8, 2006. On May 22, 2006, the court entered an order granting AmPharm/AHC’s motion for summary judgment and denying EPS/Mr. Samples’s motion for partial summary judgment. The court granted EPS/Mr. Samples’s motion to strike the affidavit of Robert Whisenant, CPA, for purposes of the summary judgment hearing. The court found no genuine issues of material fact on the partnership issue and stated that

²Mr. Noffsinger left EPS in early October 2001 to work for Max Well Medical.

“[n]o partnership or joint venture was formed as a matter of law, and there was no ‘wrongful’ withdrawal from a non-existent partnership or joint venture.” As to the personal liability issue, the court again found no genuine issues of material fact and concluded, as a matter of law, “that the corporate veil of Eastland Pharmacy Services, LLC should be disregarded, and that William L. Samples, shall be held personally liable for the debt owed to AmPharm, Inc. in the amount of \$120,443.07.” The court also awarded prejudgment interest.

STANDARD OF REVIEW

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Pub. Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). When the moving party does not have the burden of proof at trial, the moving party must “(1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial” in order to shift the burden of production to the nonmoving party. *Hannan v. Alltel Publishing Co.*, No. E2006-01353-SC-R11-CV, 2008 WL 475578 (Tenn. Oct. 31, 2008).

ANALYSIS

____ EPS argues that the trial court erred in granting summary judgment regarding the existence of a partnership and the propriety of piercing the corporate veil.

Partnership

A contract of partnership may be either express or implied. *Bass v. Bass*, 814 S.W.2d 38, 41 (Tenn. 1991). Courts look to the intention of the parties to determine whether a partnership exists. *Id.* The parties need not intend to form a partnership; they need only intend “to do the things which constitute a partnership.” *Id.* A partnership is formed when parties “place their money, assets, labor, or skill in commerce with the understanding that profits will be shared between them.” *Id.* In determining whether a partnership exists, a court must consider “all relevant facts, actions, and conduct of the parties.” *Id.* The party seeking to establish the existence of a partnership has the burden of proof. *Christmas Lumber Co., Inc. v. Valiga*, 99 S.W.3d 585, 595 (Tenn. Ct. App. 2002).

Contemplation of a written agreement may indicate that parties have not yet entered into a contract. *EnGenius Entm’t, Inc. v. Herenton*, 971 S.W.2d 12, 17 (Tenn. Ct. App. 1997) (holding no contract existed where parties intended written memorialization of their agreement and had not

reached agreement on essential terms). The court in *EnGenius* quoted with approval the following comment to § 27 of the Restatement (Second) of Contracts:

[I]f either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract.

EnGenius, 971 S.W.2d at 17 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 27 (1979)). In *Barnes & Robinson Co., Inc. v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 640 (Tenn. Ct. App. 2006), the court analyzed two letters of intent to determine whether a company had entered into contracts to purchase janitorial service business assets. The letters of intent expressly provided that the terms were “subject to further negotiation and were to be finalized in a definitive purchase agreement.” *Barnes*, 195 S.W.3d at 640. The letters of intent also contained a clause stating that neither party would be liable to the other in the event the sale was not completed, as well as a clause prohibiting oral modification of the letters of intent. *Id.* In affirming the trial court’s dismissal of the breach of contract claim, the court stated: “It is evident from the letters of intent that the parties agreed, when they established the framework for negotiations, that there would need to be a signed–written–definitive purchase agreement. . . .” *Id.* at 642.

EPS cites a number of facts in support of its argument that the parties entered into a partnership or joint venture, including the following: the AHC board’s approval of the joint venture with EPS; steps taken to “ramp up” the business for the joint venture, including the ordering of pharmaceuticals and the solicitation of business clients; the choosing of the PharmAssist name; acquisition of a bank account and federal tax identification number; recording of articles of organization; and the creation of a proposed balance sheet. The undisputed facts show that AHC and EPS were proceeding under the assumption that their business venture would move forward.

The undisputed facts also show, however, that the parties never reached an agreement on essential terms and contemplated the memorialization of their agreement in writing. At meetings in April 2001, Mr. Ross and Mr. Samples set target dates for getting the operating agreement in place. Ms. Vise undertook a due diligence investigation of EPS’s financial documents. As reflected in Mr. Samples’s memorandum of the airport meeting on June 1, 2001, a number of terms remained unresolved at that time, including the parties’ investments, the EPS loan, capital calls, and defaulting members. By June 20, 2001, AHC had decided against the joint venture and proposed buying all of EPS’s assets. The parties then began negotiating the terms of the proposed purchase. The proposed letters of intent, never signed by EPS, included multiple contingencies and contemplated “a definitive purchase agreement evidencing the foregoing transaction.” The EPS balance sheets show the costs of the pharmaceuticals bought through AmPharm under accounts payable or long term liabilities. Moreover, after the sale negotiations broke down, Mr. Samples acknowledged EPS’s liability to AHC in several letters.

We have concluded that the trial court properly granted summary judgment to AHC on the partnership issue and found EPS liable for the pharmaceutical debt. EPS and AHC engaged in

negotiations but never formed a partnership or joint venture. The parties never agreed on essential terms and never signed a written agreement as contemplated.

Piercing the corporate veil

There is a presumption that a corporation is to be “treated as a distinct entity, separate from its shareholders, officers, and directors.” *Oceanics Schools, Inc. v. Barbour*, 112 S.W.3d 135, 140 (Tenn. Ct. App. 2003). A corporation’s separate identity may, however, be ignored or “pierced” when that separate identity is shown to be a sham or where necessary to accomplish justice. *Id.* The corporate identity should be disregarded “with great caution and not precipitately.” *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1991). Such a determination depends upon the “special circumstances of each case and ‘the matter is particularly within the province of the trial court.’” *Oceanics*, 112 S.W.3d at 140 (quoting *Elec. Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985)). Thus, “[o]rdinarily, a determination of whether to pierce the corporate veil is not appropriate for summary judgment.” *Mike v. Po Group*, 937 S.W.2d 790, 795 (Tenn. 1996).

When examining whether to pierce a corporate veil, this court has relied on the following factors:

Factors to be considered in determining whether to disregard the corporate veil include not only whether the entity has been used to work a fraud or injustice in contravention of public policy, but also: (1) whether there was a failure to collect paid in capital; (2) whether the corporation was grossly undercapitalized; (3) the nonissuance of stock certificates; (4) the sole ownership of stock by one individual; (5) the use of the same office or business location; (6) the employment of the same employees or attorneys; (7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation; (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (9) the use of the corporation as a subterfuge in illegal transactions; (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (11) the failure to maintain arms length relationships among related entities.

Fed. Deposit Ins. Corp. v. Allen, 584 F. Supp. 386, 397 (E.D. Tenn. 1984); see *Oceanics Schools*, 112 S.W.3d at 140. It is not necessary that each of these factors be present to justify piercing the corporate veil. *Oceanics Schools*, 112 S.W.3d at 140.

AHC and AmPharm argue that summary judgment was justified in this case based upon a number of the *Allen* factors. They assert that EPS was undercapitalized, citing Mr. Samples’s deposition testimony that EPS was turned down by its wholesale suppliers when it attempted to increase the volume of pharmaceuticals it ordered. The fact that EPS was seeking additional capital in order to expand its operations does not necessarily mean that EPS was undercapitalized. AHC and AmPharm also point to a supposed failure to follow corporate formalities, citing Mr. Samples’s testimony that EPS did not account separately for the inventory purchased through the AmPharm

account. The failure to segregate these pharmaceuticals from other inventory does not, however, suggest a blurring of the line between Mr. Samples's personal finances and those of EPS. Moreover, Tenn. Code Ann. § 48-217-101(e) states: "The failure of an LLC to observe the usual company formalities or requirements relating to the exercise of its LLC powers or management of its business is not a ground for imposing personal liability on the members, governors, managers, employees or other agents of the LLC."

The main assertion made by AHC and AmPharm to justify piercing the corporate veil, an assertion repeated with regard to several of the *Allen* factors, is that "Mr. Samples commingled his personal liabilities with the liabilities of EPS by repaying the loan for an earlier failed business venture, DataMedical, with cash flow generated by EPS." In support of this assertion, they cite only statements made by accountant Robert Whisenant. The trial court granted EPS's motion to strike Mr. Whisenant's opinions and affidavit. Moreover, Mr. Samples asserts that the loan payments made to DataMedical, for which he was personally liable, were deducted from his EPS capital account and were not improper. He further contends that these payments were disclosed to AHC.

AHC and AmPharm also cite the sale of EPS's assets to Windsor as evidence of use of corporate assets to the detriment of creditors. EPS counters that the sale was a "lawful arms length transaction motivated by legitimate business concerns." EPS argues that other factors, including the theft of pharmacy assets by a pharmacist hired after Mr. Noffsinger left EPS, affected the company's viability.

We must conclude that the trial court erred in granting summary judgment on the issue of Mr. Samples's personal liability. Material factual disputes remain with respect to Mr. Samples's relationship with EPS and the propriety of the transactions cited by AHC and AmPharm. Determining whether these transactions were proper will depend upon the surrounding facts and circumstances and upon the credibility of witnesses. As previously noted, the determination as to whether to pierce the corporate veil is an issue not generally suitable for summary judgment.³ *Po Group*, 937 S.W.2d at 795. The undisputed facts do not entitle AHC and AmPharm to judgment against Mr. Samples as a matter of law.

CONCLUSION

We affirm the trial court's decision with respect to EPS's liability but reverse and remand on the issue of Mr. Samples's personal liability. Costs of appeal are assessed one half to the appellant and one half to be divided equally between the two appellees.

ANDY D. BENNETT, JUDGE

³None of the cases cited by AHC and AmPharm regarding the piercing of the corporate veil were decided by summary judgment.